United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1495

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

- v - : Docket No. 76-1495

ROBERT VOULO, :

Appellant. :

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REPLY BRIEF FOR APPELLANT FOBERT VOULO

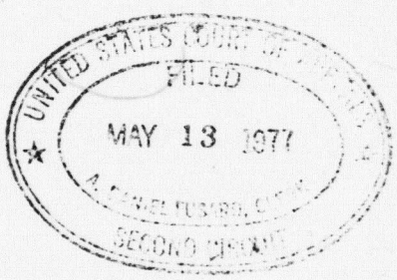

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,	:	
Appellee,	:	
- v -	:	Docket No. 76-1495
ROBERT VOULO,	:	
Appellant.	:	

REPLY BRIEF FOR APPELLANT ROBERT VOULO

The Government concedes that Voulo's conviction rests on the taps and bugs at issue in this case so that if they are thrown out, his conviction must fall. It argues however, that although he is an "aggrieved person" under the Safe Streets Act (Government Brief "GBr" 12) -- with the right on the face of the statute to challenge the legality of the taps and bugs that convicted him -- that he has no standing because he did not own the premises where the bugs were placed. The Government misreads the statute, misreads the cases, and misreads the record.

THE 309 AND HIWAY LOUNGE INVESTIGATIONS WERE DIRECTED AT VOULO. HE THEREFORE HAS STANDING TO CHALLENGE THE ILLEGAL ENTRIES AT ISSUE

The Senate Report accompanying 13 U.S.C. 2510 (11) says indeed that the provisions reflect general search and seizure law (GBr 12). The cases the Report cites, however , in particular United States ex rel. DeForte v. Mancusi, 379 F. 2d 897 (2d Cir. 1967) (Kaufman, Waterman, Smith, JJ) show this means no more than the distinction of Jones v. United States, 362 U.S. 257 (1960) between "one against whom the search is directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." 379 F. 2d at 901. When Congress said, therefore, that a party whose voice was seized is "aggrieved", it stated a specific form of standing within the already accepted general framework; because if a party's voice was seized, the search ipso facto was directed at him within the rule of Jones v. United States, supra.

The legislative history therefore, furnishes no basis for an additional requirement not stated in Section 2510 (and in fact contrary to its terms) that one must have owned the premises bugged or have been present at the time of the intrusion.*

* Brown v. United States, 411 U.S. 223 (1973) (GBr 13) has no bearing on the issues. It involved a conventional search, not tapping of bugging.

The District of Columbia Circuit so held in United States v. Ford, Feb. 11, 1977, Slip Op. 66 (GBr 29n) and so did the Eighth Circuit in United States v. Costanza, 549 F. 2d 1126, 1134 (1977), which also involved secret breaking to install listening devices:

> " An electronic interception of communications amounts to a search and seizure for fourth amendment purposes, and since the defendants were rightfully on the Necco premises and had some reasonable expectation of privacy in connection with their conversations while there, we conclude that they possess standing to raise the question now under consideration."

Voulo, then, may challenge the HiWay Lounge bug, on which he was overheard (Brief for Voulo "DBr"5), and his conversations on the 309 tap as well (DBr 4) unless, as to the latter, the Government is right that he had to have been overheard on the 309 bug before he could complain of the illegal entry there (GBr 14n). The Government is wrong. This Court made clear in United States v. Wright, 524 F. 2d 1100 (2d Cir. 1975), on which the Government relies, that a party may challenge defects in a prior order where the second was an extension of the first. The Government tells us that the 309 tap which picked up Voulo was indeed an extension of the 309 bug (GBr 50-52: "Orders 309 II and III were properly deemed extensions of order 309 I"), The district court held the same thing (A 121). That ends the matter although we note:

(a) Wright also accords standing if the prior order was directed to a party, even if he was not specifically named therein. See also United States v. Ford, supra, Slip Op. 66. The application in support of the 309 bug recited the two earlier searches and seizures in which Voulo was involved (GBr 5-6, 72; DBr 3; A 243-45, 269-71), and attached a copy of the earlier search

warrant and application (A269, 270). Voulo, therefore, was clearly identified as a member of the conspiracy and one of the parties at whom the bugging was directed.* And he was included in the 309 tap order as a named party based on the evidence which came out of the 309 bug (GBr 51-52, DBr 8n).

(b) The Government also relies on United States v. Scasino, 513 F. 2d 47 (5th Cir.1975) (GBr 14n). It supports us because the court would have found standing had the operations at which the first order was directed been deemed one with the operations of the second. 513 F. 2d at 49. The Government insists that we have just one operation here (GBr 4, 51, 73, 77).

(c) The minimization cases (GBr 13n, see also United States v. Fury, supra) are not in point. There, the Government's initial invasion of defendant's privacy rights was lawful, and so was the interception of the non-subscriber conversation. The only defect was that the Government later did too much with respect to the subscriber.

Here, however, the illegality inhered at the beginning, in the planting. And the order authorizing the bug was itself illegal. Without the illegality there would have been no invasion at all, including of Voulo's privacy rights. Voulo has standing to challenge that.

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* This distinguishes this case from Quinn's challenge to the Schnell wiretap in United States v. Fury, 2d Cir. April 27, 1977.

Respectfully Submitted

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CERTIFICATE OF SERVICE

I certify that on May 13, 1977, I mailed a copy of the Reply Brief for Robert Voulo to David Trager, 225 Cadman Plaza East, Brooklyn , New York.

Donald E. Nawi